Petition

81-1638

NO._____

Office - Supreme Court, U.S.
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ALEXANDER L. STEVAS,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

ARNOLD ALBERT, M.D.,

Petitioner,

V.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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I.

QUESTIONS PRESENTED FOR REVIEW

1. Whether, in a prosecution of a physician for dispensing controlled substances other than for a legitimate medical purpose and not in the course of professional practice, it is incumbent upon the prosecution to establish that there was, in fact, with regard to the controlled substance in question, a standard of professional practice in the United States sufficient to support a finding, beyond a reasonable doubt, that such a standard had been violated. Appellant's contention is that even if the standard "other than for a legitimate medical purpose and not in the course of professional practice" is not unconstitutionally vague, that there remains a serious constitutional

question as to whether the regulation, as applied to the specific controlled substances involved (Preludin and Tuinal) provides criminal sanctions for conduct which cannot be determined with reference to any reasonably ascertainable standard, either by reference to a Statute or Regulation, or by reference to the body of medical and pharmacological authority within the United States. Appellant believes that the decision of the Court of Appeals in this cause is in conflict with the opinion of the Supreme Court of the United States in the case of Colautti v. Franklin, 439 U.S. 379, 99 S.Ct. 675, 58 L.Ed.2d 596 (1979), and that the conflict or apparent conflict should be resolved by the Supreme Court.

2. Whether the admission in evidence by the Trial Court of approxima-

tely 20,0000 prescriptions relating to the dispensing of controlled substances on occasions not alleged in the indictment violated Dr. Albert's right of confrontation and whether the same also violated the general rule regarding the admission of extraneous offenses, because there was no evidence as to the medical condition of the recipients of the prescriptions, and consequently, there was an insufficent basis upon which the Trial Court could have found the prescriptions to have been issued unlawfully. Appellant contends that the constitutional error was twofold. First, the actual recipients of the controlled substances were not present to testify, thus violating the right of confrontation. Secondly, Doctor Albert's right not to be tried for offenses other than those alleged in the

indictment was violated because he was forced to defend the accusation of approximately 20,0000 separate instances of criminal conduct in addition to those alleged in the indictment.

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II.

OPINIONS DELIVERED IN COURTS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is not reported: A copy of said opinion is appended hereto as "Exhibit A".

III.

JURISDICTIONAL STATEMENT

The judgment sought to be reviewed was entered by a panel of the United States Court of Appeals for the Fifth Circuit on November 3, 1981. Petitioner's motion for rehearing was denied on December 29, 1981.

This Court has jurisdiction to review the judgment in question by Writ of Certiorari pursuant to 28 USC §1254.

IV.

STATUTES AND REGULATIONS IN QUESTION

1. Title 21, Code of Federal Regulations, Section 1306.02(b) provides:

"As used in this part, the following terms shall have the meanings specified:"

The term 'individual practitioner' means a physician, dentist, veterinarian, or other individual licensed, registered, or otherwise permitted, by the United States or in the jurisdiction in which he practices, to dispense a controlled substance in the course of professional practice, but does not include a pharmacist, a pharmacy, or an institutional practitioner."

2. Title 21, Code Federal

Regulations, Section 13.06(a)(1) provides:

"A prescription for a controlled substance may be issued only by an individual practitioner who is:

(1) Authorized to prescribe controlled substances by jurisdiction in which he is licensed to practice his profession."

3. Title 21, Code of Federal Regulations, Section 1306.04(a) provides:

"A prescription for a controlled substance to be effective must be issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice. The responsibility for the proper prescribing and dispensing of controlled substances is upon the prescribing prac-

titioner, but a corresponding responsibility rests with the pharmacist who fills the prescription. An order purporting to a prescription issued not in the usual course of professional treatment or in legitimate and authorized research is not a prescription within the meaning and intent of Section 309 of the Act (21 U.S.C. 829) and the person knowingly filling such a purported prescription, as well as the person issuing it, shall be subject to the penalties provided for violations of the provision of law relating to controlled substances."

4. Title 21, Code Federal Regulations, Section 1306.06 provides:

"A prescription for controlled substances may only be filled by a pharmacist acting in the usual course of his professional practice and either

registered individually or employed in a registered pharmacy or registered institutional practitioner."

5. Title 21, United States Code, Section 802(b)(10) provides:

"The term 'dispense' means to deliver a controlled substance to an ultimate user or research subject by, or pursuant to, the lawful order of a practitioner, including the prescribing and administering of a controlled substance and the packaging, labeling, or compounding necessary to prepare the substance for such delivery. The term "dispenser" means a practitioner who so delivers a controlled substance to an ultimate user or research subject".

6. Title 21, United States Code, Section 802(20) provides:

"The term 'practitioner' means a physician, dentist, veterinarian, scien-

tific investigator, pharmacy, hospital, or other person licensed, registered, or otherwise permitted, by the United States or the jurisdiction in which he practices or does research, to distribute, dispense, conduct research with respect to, administer, or use in teaching or chemical analysis, a controlled substance in the course of professional practice or research."

7. Title 21, United States Code, Section 821 provides:

"The Attorney General is authorized to promulgate rules and regulations and to charge reasonable fees relating to the registration and control of the manufacture, distribution and dispensing of controlled substances."

8. Title 21, United States Code, Section 841(a)(1) provides:

"Except as authorized by this

subchapter, it shall be unlawful for any person knowingly or intentionally;

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance."

V.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition in Court Below:

Appellant, Dr. Arnold Albert, a physician, was indicted jointly with James Hollis Cleveland, a pharmacist, and charged with five counts of dispensing Preludin and Tuinal other than in the course of professional practice and not for a legitimate medical prupose, and

with one conspiracy count. After a joint trial, the Jury found Dr. Albert guilty on all counts, but acquitted Mr. Cleveland. The Court thereafter granted Dr. Albert's Motion for Judgment of Acquittal as to the conspiracy count and sentenced Dr. Albert on the remaining counts to an effective sentence of confinement for two years and imposed a fine of $20,000.00.

Dr. Albert perfected an appeal to the United States Court of Appeals for the Fifth Circuit with regard to the judgment of conviction on the substantive counts. In an opinion which was not reported, and which was dated November 3, 1981, the conviction was affirmed. Dr. Albert sought rehearing both by the panel issuing the opinion and by the court en banc but rehearing was denied on December 29, 1981.

The government appealed the judgment of acquittal as to the conspiracy count of the indictment, and that appeal has not yet been decided.

B. Statement of Facts

At the time of trial, Dr. Albert was 71 years old and had practiced medicine in San Antonio, Texas, for 29 years. Dr. Albert's Clinic shared a common entrance with "Cleveland's Professional Pharmacy," and as a consequence, the majority of prescriptions filled at the pharmacy were for Dr. Albert's patients.

At trial, the two primary witnesses for the Government were Doris Francis and Herman Francis, who were husband and wife. Mrs. Francis testified that in July of 1977, she went to see Dr. Arnold Albert as a patient. She

testified that she told him that she was a model and wanted to lose weight and felt that she needed diet pills. According to Mrs. Francis, Dr. Albert required her to take a blood test, took her blood pressure and weighed her. She testified that on the first visit she obtained fourteen Preludins from the pharmacy located at the front of the Arnold Albert clinic (Cleveland's Professional Pharmacy). Mrs. Francis testified that after approximately two weeks, she returned to Dr. Albert's clinic and that she thereafter proceeded to go to the clinic on a more or less regular basis. She testified that normally she would receive fourteen Preludins and Twelve Tuinals on each visit.

Mrs. Francis testified that, unbeknownst to Dr. Albert, she and her husband were engaged in the business of

reselling Preludin and Tuinal, and that she visited numerous other physicians throughout the state of Texas for the purpose of obtaining the Preludin and Tuinal. She testified that she continued, during her visits to Dr. Albert and other physicians in 1977 and 1978 to maintain the fiction that she was a model, and that she needed to remain thin so that she could continue to be employed.

In April of 1979, Mrs. Francis and her husband agreed to cooperate with Government Agents and agreed to "make cases" regarding various doctors and pharmacists in the San Antonio area in an effort to prevent Herman Francis' parole from being evoked.

During May, 1979, Mr. and Mrs. Francis began a series of transactions with Dr. Albert and Mr. Cleveland in

which they made telephone calls which were recorded, and wore concealed radio transmitters on their persons while making visits to Dr. Albert's office and Mr. Cleveland's pharmacy. Tape recordings of the telephone calls and of the conversations were played for the Jury, and the tapes as well as transcripts of the tapes were admitted in evidence.

The dates alleged in the substantive counts of the indictment correspond to the dates on which Doris and Herman Francis testified that they received Preludin and Tuinal while wearing concealed body microphones.

At trial, the Government was permitted to offer in evidence a computer printout summary of approximately 20,000 prescriptions which were seized from the pharmacy pursuant to a search warrant. Approximately 17,000 of the prescrip-

tions were for Preludin and Tuinal and had been issued over a two and one-half year period by Dr. Albert. A Drug Enforcement Administration Agent, who executed the search warrant, also was permitted to testify that he was unable to locate, at Dr. Albert's clinic, patient records for various individuals in whose names Dr. Albert had issued prescriptions.

The Government called as experts a professor of pharmacology, an Air Force physician, and a practicing pharmacist. The physician and professor of pharmacology testified that in their opinion no legitimate medical purpose could be served by the administration of Preludin and Tuinal for more than a few weeks duration based upon the recommendation of the manufacturers of the drugs. The physician testified that in his opinion,

Preludin was ineffective for any purpose, but he acknowledged that some physicians believed that it had an anorectic effect. On cross examination, both he and the professor of pharmacology recognized that the placebo effect (meaning a situation in which a non-chemically effective medication nevertheless produces results) cannot be ignored by a physician, and that the psychological rather than pharmacological effect of a drug is often the determinative factor insofar as a physician's decision to prescribe or not to prescribe is concerned.

Dr. Albert testified that he had been involved in treating patients for obesity since the latter days of the Second World War, and that in his opinion Preludin was effective for the long term control of weight. Dr. Albert also

testified that in his experience, patients who were supplied with Preludin over an extended period of time frequently suffered from insomnia, and that he often prescribed Tuinal for the purpose of treating the insomnia. Dr. Albert acknowledged that he had prescribed Preludin and Tuinal for Doris and Herman Francis in exchange for merchandise, but maintained that he did so for what he believed was a legitimate medical purpose.

Dr. Albert testified that he had been "conned" by Doris and Herman Francis. He testified that he found Doris Francis to be a good conversationalist and a person whose demeanor and poise were consistent with her story that she was a fashion model. The doctor testified that at all times his issuing of prescriptions for Preludin

and Tuinal for Doris and Herman Francis was done for what he then believed to be a legitimate medical purpose, but that if at some point no legitimate medical purpose was served, it was because they had induced him to prescribe by continuously exerting subtle pressure upon him. With regard to the extraneous prescriptions, Dr. Albert testified that he disagreed vehemently with the government's experts and maintained that long term administration of Preludin and Tuinal was, based upon his clinical experience, effective and safe.

Dr. Albert called three physicians to testify on his behalf. All three physicians questioned the ability of the Government's experts to form an opinion that no legitimate medical purpose was demonstrated by the extraneous prescriptions, based solely on frequency and

quanity prescribed. All three physicians testified that a determination as to legitimate medical purpose could not be made based solely on frequency and number. One of the physicians, Dr. Louis Helfer, testified that in his opinion, the long term administration of an amphetamine-like controlled substance such as Preludin would indeed have a continuing appetite-suppressant effect, and that he believed that a physician would be completely justified in following his own clinical experience, regardless of the recommendations made by the manufacturer of the drugs.

VI.

FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE

This case began as a prosecution for an offense against the laws of the

Unites States. Accordingly, the basis for federal jurisdiction in the Court of first instance, the United States District Court for the Western District of Texas, was Section 3231 of Title 18, United States Code.

VII.

ARGUMENT IN SUPPORT
OF ALLOWANCE OF THE WRIT

Petitioner respectfully submits that this court should grant certiorari for two reasons. First, the language of the regulation in question, when coupled with the divergence of medical testimony at trial, falls within the holding of Colautti v. Franklin, 439 U.S. 379, 99 S.Ct. 675, 58 L.Ed.2d 596 (1979), that a statute which seeks to punish as criminal the existence of medical judgment cannot stand in the face of a divergence

of expert medical opinion regarding that procedure, and as a consequence, the judgment of the Court of Appeals is in conflict with that case. This court should grant certiorari to reconcile that conflict. Secondly, Colautti is an apparent conflict with Doe v. Bolton, 410 U.S. 179, 93 S.Ct. 739, 35 L.Ed 2d 201 (1973); and United States v. Vuitch, 402 U.S. 62, 91 S.Ct. 1294, 28 L.Ed 2d 601 (1971), and this court should grant certiorari to resolve that conflict.

Throughout the trial, an issue which was vigorously contested by Petitioner and brought before the Court of Appeals by appeal was whether there was in fact a standard of professional practice among physicians with regard to the dispensing of Preludin and Tuinal. The Government's only physician witness in its case in chief was Dr. Randol C.

Johnson. Dr. Johnson, on direct examination, testified that in his opinion Preludin is not effective as an appetite-suppressant, although he acknowledged that it was said to be effective, at least for a short period of time. His personal opinion, however, was that it was not.

Dr. Johnson also testified that in his opinion there was no legitimate medical purpose served in the administration of Preludin and Tuinal in combination over an extended period of time. On cross examination, however, Dr. Johnson went further and stated that he would never prescribe Preludin and that he could see no justification for prescribing either Preludin or Tuinal. Dr. Johnson did recognize, however, that Preludin could continue to aid a person in combating obesity as a result of the

placebo effect when given over an extended period of time, even though it had no chemical effect. He insisted, however, that the standards of professional practice required a phusician to follow the drug manufacturer's guidelines as set forth in the Physician's Desk Reference. He testified that even if a physician believed, in good faith and based upon clinical experience that a drug was effective in treating a particular condition, the physician would nevertheless not be acting for a legitimate medical purpose if he prescribed the drug for a condition not indicated by its manufacturer. Dr. Johnson based his knowledge solely upon his Air Force experience and the medical literature. He had never prescribed Preludin or Tuinal in his practice.

Dr. Louis H. Helfer, a defense wit-

ness, testified that a physician practiced for a legitimate medical purpose when he dispenses based upon his prior experience with his patients, and that such was the community standard in San Antonio, regardless of manufacturer's recommendation.

Dr. Albert testified that based upon his clinical experience, Preludin is effective as an appetite control drug when administered over a prolonged period of time and that it frequently causes insomnia in patients who take it.

Even the Government's witnesses admitted that although they did not agree with the practice, the administration of a drug for a non-approved or non-indicated usage or duration could nevertheless be done for a legitimate medical purpose by a physician who found, based upon his clinical

experience, that the drug was effective in the manner in which it was used, provided that the patient was advised that the drug was being given for a non-indicated usage.

The evidence at trial demonstrated that there is sufficient divergence of opinion within the medical community, so as to preclude a finding by the Jury in the instant case that there was a medically recognized standard of professional practice with regard to the dispensing of Preludin and Tuinal.

The terms "legitimate medical purpose" and "in the course of professional practice" are defined neither by statute nor by regulation. The operative statute is 21 U.S.C. §841, and the regulation is 21 C.F.R. §1306.04(a). It is therefore incumbent upon the Government, as part of its proof, to

establish beyond a resonable doubt, what constitutes a legitimate medical purpose for a given controlled substance. United States v. Rosen, 582 F.2d 1032 (5th Cir. 1978). In the present case, the Government failed to discharge this burden. In its case in chief, the Government established that Dr. Albert did not follow the course of practice which Dr. Johnson and Dr. Yanchick (who was not a physician but a pharmacist) would have followed. However, the Government did not establish that there was at the times alleged in the Indictment a standard of professional practice sufficiently ascertainable so as to support a criminl prosecution based upon its violation.

In the case of Colautti v. Franklin, 439 U.S. 379, (58 L.Ed.2d 596), 99 S.Ct. 657 (1979), the Supreme Court of the

United States held that a criminal statute which punished as criminal a physician who failed to employ a certain degree of care was unconstitutionally void on account of vagueness because the standard involved a complex medical judgment about which experts are in disagreement.

Assuming arguendo that the statute and regulation are constitutional, the application of the statute in the instant case, in light of the testimony of the Government's witnesses is unconstitutional because of the disagreement between the Government's witnesses, and also between the Government's witnesses and the defense experts.

If a question involving a complex medical judgment about which experts cannot agree is sufficient to render a

statute unconstitutionally vague and therefore void, as in Colautti vs. Franklin, supra, then surely a conviction had under testimony which evidenced medical disagreement among experts cannot stand, when no other standard is set forth in the statute creating the offense.

Even if the evidence was sufficient to support a finding that a professional standard did indeed exist with regard to Preludin and Tuinal, the Court erred in not requiring the Jury to find its existence beyond a reasonable doubt as a prerequisite to conviction.

With respect to the issue of the existence of a standard of professional practice, in addition to moving for Judgment of Acquittal, Dr. Albert also requested the Court to instruct the Jury that it must find beyond a reasonable

doubt that there was in fact a standard of professional practice for physicians in the United States with respect to administering Preludin and Tuinal, before it could return a verdict of guilty, and objected to the Court's failure to so charge.

It is well settled that the failure to instruct the Jury that it must find that the Government has established all of the essential elements of the offense beyond a reasonable doubt is plain error. United States v. Hellman, 560 F.2d 1235 (5th Cir. 1977); Kibbe v. Henderson, 534 F.2d439 (2nd Cir. 1976); Casella v. United States, 449 F.2d 277 (3rd Cir. 1971); Cf. Mullaney v. Wilbur, 421 U.S. 684, 44 L.Ed.2d 508, 95 S.Ct. 1881 (1975). Thus the failure of the Court to instruct the Jury that it must find beyond a reasonable doubt that

a professional standard existed was an error of constitutional dimension.

The terms "in the usual course of his professional practice" and "legitimate medical purpose" as used in 21 C.F.R. §1306.04(a) and §1306.06 are too vague to form the basis for a criminal prosecution with respect to Preludin and Tuinal.

In the case of Colautti v. Franklin, 439 U.S. 379, 58 L.Ed.2d 596, 99 S.Ct. 675 (1979), the United States Supreme Court held that a statute which provided criminal sanctions for a physician who failed to employ an abortion technique which would provide the "best opportunity" for the fetus to be aborted alive was unconstitutionally void for vagueness because, based upon the testimony at the trial, the decision was dependent upon the resolution of a

complex medical judgment which was subject to wide disagreement among experts. The Court held a criminal prosecution based upon such a standard was violative of due process because it did not sufficiently apprise affected persons of the prohibited conduct.

In the instant case, the divergence of medical testimony had the same effect as in Colautti v. Franklin, supra. For example, even the Government experts disagreed as to whether a physician practices other than for a legitimate medical purpose when he prescribes an ineffective drug in an effort to treat a patient. Also, the defense experts disagreed as to the weight which a physician should give to medical literature when the physician's clinical experience was at odds with published articles. The Government witnesses felt that a

physician was bound to follow the manufacturor's recommendations and to disregard his personal clinical experience with the drug, while the defense physicians testified that a physician could properly follow the course of treatment which his experience had shown to be appropriate, regardless of the recommendations set forth in the Physician's Desk Reference.

The crux of the conflict with regard to the standard to be followed is a prime illustration of the constitutional flaw in the application of the "other than in the ocurse of professional practice" and "legitimate medical purpose" standard, at least with regard to Preludin and Tuinal. Such a situation is constitutionally intolerable.

Dr. Albert was convicted of

violating the provisions of Section 841(a)(1) of Title 21, United States Code, in that he was found to have dispensed Preludin and Tuinal in violation of a regulation promulgated under the provisions of Section 821 of Title 21, United States Code. The regulation in question is Section 1306.04 of Title 21, Code of Federal Regulations, which provides that a prescription for a controlled substance, in order to be effective, "must be issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice."

In the trial court and in the Court of Appeals, Dr. Albert contended that the language of the regulation was unconstitutionally vague, but further maintained that even if it was not unconstitutionally vague per se, it was

unconstitutionally vague with regard to the particular controlled substances in question because the evidence at trial demonstrated such a divergence of medical opinion, on the part of expert witnesses called by by the Government and by the defense, that there was, at the time in question, no reasonably ascertainable medical standard in the United States with regard to the dispensing of Preludin and Tuinal which could be determined beyond a reasonable doubt in a criminal prosecution. That is, Dr. Albert could not be convicted of dispensing other than for a legitimate medical purpose because the evidence at trial showed that medical experts could not agree as to what constituted a legitimate medical purpose for the controlled substances in question. If there was no such agreement, and thus no

ascertainable medical standard, then a conviction for violating such a non-existent standard cannot stand.

Dr. Albert contended, both at trial and on appeal, that the facts in his case fall within the holding of this court in Colautti vs. Franklin, 439 U.S. 379, 99 S.Ct. 675, 58 L.Ed.2d 596 (1979). In that case, this court held that the determination of the constitutional validity of a criminal statute which involved the exercise of a medical judgment by a physician must be determined not only with reference to the wording of the statute, but also with regard to the expert medical testimony adduced at trial. This court held that, on account of divergent medical testimony, the statute was unconstitutionally vague.

On appeal, the Court of appeals

rejected this contention, and cited two prior cases of this Court: Doe vs. Bolton, 410 US. 179, 93 S.Ct. 739, 35 L.Ed.2d 201 (1973); and United States vs. Vuitch, 402 U.S. 62, 91 S.Ct. 1294, 28 L.Ed.2d 601 (1971). The Court of Appeals, in its opinion, stated "The language here attacked is as clear as that sustained in Bolton and Vuitch."

In Bolton, this Court held that a state criminal statute which required a physician to use his "best clinical judgment" in determining if an abortion was "necessary", was not unconstitutionally vague. In Vuitch, this Court upheld a statute which made abortions criminal "unless the same were done as necessary for the preservation of the mother's life or health" as against a challenge of unconstitutional vagueness. In Colautti, however, this Court con-

sidered a challenge on the ground of vagueness, to a state statute which required a physician performing an abortion to make a determination "based on his experience, judgment or professional competence" as to whether the fetus was viable, and in the event of a determination that it was "viable", to "exercise that degree of professional skill, care and dilligence" to perserve the life of the fetus so long as a different technique was not "necessary in order to preserve the life or health of the mother." This Court held that both standards were unconstitutionally vague and relied not only upon the wording of the statute but also upon the divergence of medical testimony at trial in reaching its decision.

Dr. Albert respectfuly submits that this Court should grant certiorari for

two reasons. First, the language of the regulation in question, when coupled with the divergence of medical testimony at trial, falls within the holding in Colautti, and as a consequence, the judgment of the Court of Appeals is in conflict with that case. This court should grant certiorari to reconcile that conflict. Secondly, Colautti, is in apparent conflict with Bolton and Vuitch, and this court should grant certiorari to resolve that conflict.

With regard to the conflict between Bolton and Vuitch, the necessity for clarification from this court is best evidenced by the opinion of the Court of Appeals. The Court of Appeals did not distinguish the facts in Colautti from those in the instant case, but rather relied upon the holdings in Bolton and Vuitch. Dr. Albert respectfully submits

that the Court of Appeals could not have distinguished Colautti from the facts of the instant case because they are, in fact, indistinguishable. Therefore, this court should grant certiorari to reconcile the conflict between Colautti and Bolton and Vuitch.

CONCLUSION

The Application for Writ of Certiorari should be granted so that the conflict between the holding of the Court of Appeals and the decision of the Supreme Court in the case of Colautti vs. Franklin, 439 U.S. 379, 99 S.Ct. 675, 58 L.Ed.2d 596 (1979), can be resolved, and further so that the Supreme Court can resolve or reconcile the apparent conflict between Colautti vs. Franklin, supra; and Doe vs. Bolton, 410 US. 179, 93 S.Ct. 739, 35 L.Ed.2d

201 (1973); and United States vs. Vuitch, 402 U.S. 62, 91 S.Ct. 1294, 28 L.Ed.2d 601 (1971).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that three copies of the foregoing "Application for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit" were served upon the followng parties by depositing the same with the United States Post Office, with first class postage prepaid, certified mail, return receipt requested, on the____day of February, 1982:

Edward C. Prado, United States Attorney
and John E. Murphy, Assistant United
States Attorney,
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Mr. Robert J. Erickson,
United States Department of Justice
Criminal Division
P.O. Box 899
Ben Franklin Station,
Washington, D.C. 20044

The Solicitor General of the United States
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Washington, D.C. 20530

I further certify that all parties required under Rule 28, Rules of the Supreme Court, to be served have been served.

JACK PAUL LEON

Appendix

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 80-2060

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ARNOLD ALBERT,

Defendant-Appellant.

- - - - -

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT
OF TEXAS

- - - - -

ON PETITION FOR REHEARING AND
SUGGESTIONS FOR REHEARING EN BANC

(Opinion November 3, 1981, 5 Cir., 198_,

_____F.2d_____).

(December 29, 1981

Before CHARLES CLARK, Chief Judge,
RUBIN and SAM D. JOHNSON,
Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge of this Administrative Unit in regular active service having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16; Fifth Circuit Judicial Council Resolution of January 14, 1981), the suggestion for Rehearing En Bank is DENIED.

( ) The Petition for Rehearing is DENIED and the judges in regular active service of this Administrative Unit having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it

(Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16; Fifth Circuit Judicial Council Resolution of January 14, 1981), the suggestion for Rehearing En Bank is also DENIED.

( ) A member of this Administrative Unit in active service having requested a poll on the reconsideration in this cause en banc, and a majority of the judges in active service of said unit not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

_____
United States Circuit
Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 80-2060
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ARNOLD ALBERT,

Defendant-Appellant.

Appeal from the United States
District Court for the
Western District of Texas

Before CHARLES CLARK, Chief Judge, RUBIN and SAM D. JOHNSON, Circuit Judges.

RUBIN, Circuit Judge:

Dr. Arnold Albert, a 71-year-old physician who has practiced medicine in

San Antonio, Texas for 29 years, appeals his conviction on five counts of dispensing Preludin and Tuinal other than in the course of professional practice and not for a legitimate medical purpose. Finding the evidence sufficient and no error by the district court in the various respects challenged, we affirm.

The facts, viewed most favorably to the government, as they now must be, Glasser v. United States, 315 U.S. 60, 80, 62 S.Ct. 457, 469, 86 L.Ed. 680,____ (1942), could be found to be as follows. Doris Francis, an informant who testified for the prosecution, first sought out Dr. Albert in the summer of 1977 to obtain prescriptions for diet medication so that after filling the prescriptions, her husband could sell the drugs. She represented herself to

be a model and to have a need to stay thin, presumably because she was 5'7" tall, weighed 125 pounds, and had no apparent need for weight control. Dr. Albert made a perfunctory examination, and orally authorized Cleveland's Pharmacy, located on the same premises as Dr. Albert's office, to supply drugs to her.

Thereafter, in the autumn of 1978, the Francises agreed to trade stolen merchandise to Dr. Albert and Cleveland in exchange for drugs. For a number of months they obtained drugs far exceeding their possible legitimate medical needs, some during regular office visits and some during visits unrecorded in Dr. Albert's records, when merchandise was exchanged. Thus, in December 1978, Mrs. Francis received 84 Preludins and 72 Tuinals; her husband received 60

Preludins and 24 Tuinals.

Mr. Francis was on parole. In April 1979, when revocation of his parole was threatened, the Francises agreed to cooperate with law enforcement officers to "make cases" on various doctors and pharmacists in the San Antonio area. Pursuant to this plan, they called on Dr. Albert five times. Each visit was monitored electronically. During these visits, the Francises negotiated actively with Dr. Albert and Cleveland concerning the amount of drugs they were to receive, and traded merchandise with Dr. Albert and Cleveland for Preludin and Tuinal. Dr. Albert wrote prescriptions in fictitious names solicited from the Francises. He made no medical examination, prescribed no diet, conducted no inquiry about eating habits, but he and Cleveland did warn the Francises that he

and Cleveland were being watched by narcotics officers and, accordingly, that the Francises should be careful.

In addition the government offered the testimony of experts: a professor of pharmacy and pharmacology; a pharmacist; and an M.D. who was a specialist in internal medicine. In sum, the experts testified that Preludin is an amphetamine-like substance with a limited anoretic effect. When combined with a regulated diet, this quality makes it useful in weight control programs, but only for a short period of time. Because tolerance for the drug develops quickly, its effective use as a hunger suppressant is limited to two or three weeks. The experts described Tuinal as a barbituate that can properly be used to induce sleep in insomniacs. Tolerance to it is also usually deve-

loped in two to three weeks. They testified that it is unusual and improper to prescribe the two drugs in conjunction.

The government also introduced compilations showing that Cleveland's pharmacy had filled 20,027 prescriptions for Schedule II drugs in the two years between November 1977 and November 1979, far exceeding the average of other pharmacies in the same area. About 17,000 of these were issued by Dr. Albert for Preludin and Tuinal. The experts testified that it was not "standard operating procedure" for a physician in San Antonio to prescribe these drugs in the manner and with the frequency indicated.

Dr. Albert testified that he prescribed the drugs to the Francises for a legitimate medical purpose. He

considered Preludin effective in weight reduction over extended periods of time. He found no harmful effects from the use of Preludin and Tuinal in conjunction. He called three other doctors as expert witnesses. They testified that a physician's judgment, nor the manufacturer's recommendation, defines the scope of legitimate medical practice. They did not find the prosecutor's compilation of the prescriptions sufficient to support a judgment that the drugs were not properly prescribed. One also testified that the appetite suppressant effects of Preludin continue over a long time and that Tuinal may properly be used to control its side effects. This expert also testified, however, that he did not prescribe Preludin for his own patients, would not prescribe a drug for a patient

who intended to sell it, would not prescribe for a person whom he had not seen as a patient, would not negotiate with a patient about the quantity of a prescription, and, before prescribing it, would give a patient an extensive medical examination and a recommended diet.

This summary of the testimony demonstrates that the evidence was ample to support the conviction. Indeed, we recite it only to make clear the other objections and our disposition of them.

Dr. Albert argues that the evidence was insufficient because the medical experts who testified disagreed as to the proper role which Preludin and Tuinal could play in a weight reduction program, concededly a legitimate medical undertaking. Even if the testimony were sufficient to create doubt about the

impropriety of using these drugs for lengthy periods of time, this argument misses the point. Dr. Albert was accused, not of improperly prescribing drugs, given a legitimate medical purpose, but rather of not having any legitimate medical purpose for prescribing them on the occasions specified in the indictment. United States v. Rosen, 448, F.Supp. 926, 932 (E.D. La. 1977), aff'd 582 F.2d 1032(5th Cir. 1978). Moreover, even if this conflict in the opinions of the experts were relevant, the determination of which to credit was an issue for the jury. See e.g., United States v. Kirk, 584 F.2d 773, 785-86 (6th Cir.), cert. denied, 439 U.S. 1048, 99 S.Ct. 726, 58 L.Ed.2d 708 (1978).

Dr. Albert contends that, because the experts did not agree on a medical standard, the regulation under which he

was indicted was unconstitutionally vague. Regulations promulgated under the Comprehensive Drug Prevention and Control Act of 1970, 21 U.S.C. 801, et seq., provide that prescriptions "must be issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice." 21 C.F.R. 1306.04(a). We have repeatedly sustained the constitutional sufficiency of this language. United States v. Hayes, 595 F.2d 258, 260 (5th Cir.), cert. denied, 444 U.S. 866, 100 S.Ct. 138,_____L.Ed.2d_____(1979; United States v. Rosenberg, 515 F.2d 190, 193, 197-98 (9th Cir..) (Collecting cases decided under predecessor statutes), cert. denied, 423 U.S. 1031, 96 S.Ct. 562, 46 L.Ed.2d 404 (1975); United States v. Collier, 478 F.2d 268, 270-72

(5th Cir. 1973) (collecting cases decided under predecessor statutes).

The Supreme Court's decision in Colautti v. Franklin, 439 U.S. 379, 99 S.C. 675, 58 L.Ed.2d 596 (1979), is not to the contrary. There, a state criminal statute designed to limit the availability of abortions provided conflicting definitions of "viability," at least one of which differed from the definition promulgated in prior Supreme Court decisions. The court found the statute to be constitutionally defective because it "condition[ed] potential criminal liability on confusing and ambiguous criteria" and imposed criminal liability without regard to fault. In so doing, the Court specifically distinguished the clear standards of medical practice involved in Doe v. Bolton, 410 U.S. 179, 93 S.Ct. 739, 35

L.Ed.2d 201 (1973) (requirement that use "best clinical judgment" to determine if an abortion is "necessry"), and United States v. Vuitch, 402 U.S. 62, 91 S.Ct. 1294, 28 L.Ed.2d 601 (1971) (whether abortion is "necessary for the preservation of the mother's life or health"). The language here attacked is as clear as that sustained in Bolton and Vuitch.

The indictment was not defective because it failed to name the persons to whom Dr. Albert dispensed. In order to convict a physician of violating 21 U.S.C. 841(a)(1), it is only necessary to prove that he dispensed a particular controlled substance, that he acted knowingly and intentionally, and that he did so for other than a legitimate medical purpose and in the usual course of professional practice. See, e.g., United States v. Hayes, supra, 595 F.2d

at 259 n.2; United States v. Rosen, supra, 582 F.2d at 1033. The indictment fully alleged each of these essential elements and particularized the date of the dispensations, the names of the controlled substances, and the applicable statutory and regulatory provisions. There is no additional requirement that an indictment charging an offense under Section 841(a)(1) allege the name of the recipient of the illegal distribution. See, e.g., United States v. Cosby, 529 F.2d 143, 146 (8th Cir.), cert. denied, 426 U.S. 935, 96 S.Ct. 2647, 49 L.Ed.2d 386 (1976); United States v. Miranda, 494 F.2d 783, 788 (5th Cir.) cert. denied, 419 U.S. 966, 95 S.Ct. 228, 42 L.Ed.2d 181 (1974); United States v. Martin, 482 F.2d 202, 204 (8th Cir. 1973). The rule is the same when a doctor is charged

with unlawfully dispensing a controlled substance under Section 841(a)(1). See United States v. Roya, 574 F.2d 386, 391 (7th Cir.), cert. denied, 439 U.S. 857, 99 S.Ct. 172, 58 L.Ed.2d 165 (1978).

Dr. Albert was not prejudiced in his defense by insufficiency of the indictment or by the surprise production of evidence. In discovery, he was provided both the prescriptions for the dates alleged in the indictment and the tape recordings made of his conferences with the Francises on those days.

On November 26, 1979, DEA agents executed search warrants at Dr. Albert's clinic and at Cleveland's two pharmacies. In the ensuing searches, the agents seized the medical records of Doris Francis and of the one Joyce Little from Dr. Albert's clinic. In addition, the agents seized from

Cleveland's pharmacies 20,027 prescription slips for Schedule II controlled substances that were filled during the two years from November 1977 to November 1979. Dr. Albert contends that the seized materials should be suppressed because the affidavits supporting the applications for the search warrants contained false representations and failed to establish the reliability of two confidential informants. In addition, he contends that the warrants improperly authorized general searches.

Dr. Albert, of course, lacks standing to object to the search of Cleveland's pharmacies. We find the affidavits for the warrants to search his own office sufficient. In these affidavits, one agent stated that in four monitored exchanges, the confidential informants traded "purportedly sto-

len property" to Dr. Albert or Cleveland for controlled substances. Because federal agents purchased the goods that were later traded by the informants, Dr. Albert argues that this description of the property was a deliberate misrepresentation designed to mislead the magistrate.

As the Supreme Court held in Franks v. Delaware, 438 U.S. 154, 155-156, 98 S.Ct. 2674, 2676, 57 L.Ed.2d 667,_____ (1978), a defendant must show both that there is a deliberate misrepresentaion in an affidavit and that the allegedly false statement is necessary to establish probably cause before he is entitled to test the affidavit in a hearing. First, we fail to see how the agent's statement can be characterized as a misrepresentation. Although the property was not in fact stolen, it was

purported to be such by the Francises in their dealings with Dr. Albert and Cleveland. In any event, as the court below properly concluded, the precise character of the property was not at all essential to the establishment of probable cause. The affidavit set forth facts from which it could reasonably be concluded that Dr. Albert and Cleveland were unlawfully dispensing controlled substances. In this regard, the other facts recited in the affidavit were sufficient: that Dr. Albert and Cleveland actively negotiated the number of pills to be dispensed; that Dr. Albert solicited fictitious names for the prescriptions; that he made no medical examinations; and that Cleveland had admitted that he and Dr. Albert could lose their licenses if their dealings were discovered. Thus, even if we

accept arguendo the connotation Dr. Albert places on the word "purportedly," we find its use immaterial.

Dr. Albert contends that the warrant was not supported by probable cause because the affidavit did not show that the informants were reliable or that they were competent to determine whether the drugs were being dispensed for other than a legitimate medical reason. Although an affidavit based upon hearsay information provided by an informant must disclose facts from which a magistrate can conclude that the informant came upon his information in a reliable way and that the informant himself is reliable, see Aguilar v. Texas, 378 U.S. 108, 114-115, 84 S.Ct. 1509, 1514, 12 L.Ed.2d 723,_____(1964), there is no need to resort to this analysis here because the DEA agents' own sur-

veillance established probable cause independent of any information supplied by the informants. As the affidavit sets out, the DEA agents electronically monitored four meetings and two telephone conversations between the informants and appellant or Cleveland. This information was sufficient to show probable cause to believe that Dr. Albert and Cleveland were unlawfully dispensing drugs, and that evidence of that offense would likely to be found at their respective places of business. The warrants described with sufficient particularity the items to be seized. See Andresen v. Maryland, 427 U.S. 463, 479-482, 96 S.Ct. 2737, 2748-49, 49 L.Ed.2d 627,_____(1976). See also United States v. Osborne, 630 F.2d 374, 378 (5th Cir. 1980), cert. denied, _____ U.S._____, 101 S.Ct. 1398,_____L.Ed.2d

_____(1981). The district court did not err in admitting into evidence a computer printout summarizing the 20,027 Schedule II controlled substance prescriptions filled at Cleveland's pharmacies during the two years preceding Dr. Albert's indictment. Although not admissible to prove character, evidence of uncharged acts is admissible to prove "motive, opportunity, preparation, plan, knowledge, identity, or absence of mistake or accident" whenever the extrinsic acts are relevant for this purpose and their probative value is not subtantially outweighed by any undue prejudice. Rule 404(b), Fed. R. Evid. See United States v. Beechum, 582 F.2d 898, 911 (5th Cir. 1978) (en banc), cert. denied, 440 U.S. 920, 99 S.Ct. 1244, 59 L.Ed.2d 472 (1979). The determination of whether

evidence of extrinsic conduct should be admitted is committed to the trial court's sound discretion, and its ruling will be disturbed only for a clear abuse of that discretion. See, e.g., United States v. Benton, 637 F.2d 1052, 1056 (5th Cir. 1981). There was no such abuse here.

We have repeatedly held that evidence of extraneous prescriptions issued by a physician is properly admissible in a prosecution for unlawfully dispensing drugs. See United States v. Harrison, 651 F.2d 353, 355 (5th Cir. 1981); United States v. Dunbar, 614 F.2d 39, 41-42 (5th Cir.) (per curiam), cert. denied, 447 U.S. 926, 100 S.Ct. 3022, _____L.Ed.2d_____(1980); United States v. Rogers, 609 F.2d 834, 837, 839-840 (5th Cir. 1980) (per curiam) ("a large number" of extraneous prescriptions);

United States v. Jackson, 576 F.2d 46 (5th Cir. 1978) (5,000 prescriptions written over a 15-month period). The district court engaged in precisely the sort of careful balancing envisioned by this court in Beechum, supra, before admitting the extraneous prescriptions. When the evidence was first proferred by the government, the Court ruled that there was insufficient evidence from which it could be inferred that the extraneous prescriptions were issued outside the bounds of professional practice. The government thereupon presented a series of expert witnesses who testified that there was no legitimate pharmaceutical purpose for the recurring dispensation of Preludin and Tuinal to the same persons over a two year period, that the number of Schedule II prescriptions issued by Dr. Albert in

the two-year period under examination was inordinate, and that the pattern of prescriptions depicted did not evince the existence of any legitimate medical purpose. In view of this, "there was ample evidence from which it could be inferred that the extraneous prescriptions were issued outside the bounds of professional medical practice . . . ." United States v. Rogers, supra, 609 F.2d at 840.

Finally, the court gave thorough instructions limiting the jury's consideration of the extrinsic evidence. The court made clear that "the evidence that [Dr. Albert] has issued prescriptions, regardless of the number issued, is not in itself evidence of the commission of any offense." The jurors were admonished that they could "consider evidence of prescriptions for

persons other than Doris Francis or Herman Francis to be evidence of illegal conduct" only after concluding beyond a reasonable doubt from other evidence that Dr. Albert "issued the prescriptions other than in the course of professional practice and not for a legitimate medical purpose."

Finally, we turn to the alleged errors in the court's instructions. Dr. Albert first argues that the court's instruction on evaluating expert testimony was incorrect because the jury was told that it could disbelieve an expert witness only for certain enumerated reasons. The charge the court gave was not so narrow. It allowed the jury to disregard expert testimony not only if it was "not based upon sufficient education or experience," but also if it was unsound or outweighed by any other evidence in

the case. In short, the court correctly conveyed to the jury its duty to "consider" the expert testimony "and give it such weight as you may think it deserves." See United States v. Johnson, 575 F.2d 1347, 1361 (5th Cir. 1978), cert. denied, 440 U.S. 907 99 S.Ct. 1214, 59 L.Ed.2d 454 (1979). We need not, therefore, consider whether reputation for being a good physician was or was not separately admissible. Each of the expert witnesses called by the defense stated that, in his opinion, Dr. Albert had a good reputation as an honest and law-abiding citizen. These experts were then asked if they had an opinion on whether he had a reputation for being a physician who pratices medicine in a professional manner. In sum, they testified that Dr. Albert was a careful physician who enjoyed a reputa-

tion for practicing in a professional manner. In its instructions to the jury, the court therefore charged:

> Now where a defendant has offered evidence of a good general reputation for truth and veracity or honesty and integrity or as a law-abiding citizen, the jury should consider such evidence along with all the other evidence in the case. Evidence of a defendant's reputation inconsistent with those traits of character ordinarily involved in the commission of crime charged may give rise to a reasonable doubt since the Jury may feel it is improbable that a person of good character in respect of those traits would commit such a crime.

The court did not give a requested charge expressly instructing the jury that they could consider evidence of Dr. Albert's reputation for practicing medicine in accordance with professional standards and for legitimate purposes, but, in the circumstances of this case,

the court's charge on character evidence was adequate to apprise the jurors that they could consider Dr. Albert's relevant character traits.

Dr. Albert also contends that the instructions impermissibly shifted the burden of proof. The trial court stated, "it is therefore a defense to the charge in this Indictment that the controlled substances [were] prescribed by [Dr. Albert] in the course of his professional practice." Viewed in the context of the proof at trial, the court's brief charge did no more than alert the jury that it could consider all the evidence in the case in deciding whether the drugs were dispensed in the usual course of professional practice. The court also repeatedly admonished the jury that Dr. Albert was presumed to be innocent, that he was not required to

present any evidence or prove his innocence, and that the prosecution bore the burden of proving beyond a reasonable doubt each element of the offense -- including that the drugs were dispensed outside the course of professional practice and not for a legitimate medical purpose. Accordingly, the single reference to a "defense" in the course of the court's comprehensive and careful jury charge did not improperly shift the burden of proof. Cf. United States v. Brown, 582 F.2d 197, 201-202 (2d Cir.), cert. denied, 439 U.S. 915, 99 S. Ct. 289, 58 L.Ed.2d 262 (1978).

Nor did the court err in instructing the jury that a controlled substance is lawfully "prescribed by a physician in the course of his professionsl practice . . . if the substance is prescribed by him in good faith in medically treating

a patient." The court's use of the "good faith" formulation comports with the jury instructions given in other cases where doctors have been prosecuted for unlawfully dispensing drugs. See United States v. Moore, 423 U.S. 122, 138-139, 96 S.Ct. 335, 342-44, 46 L.Ed.2d 333, _____(1975); United States v. Potter, 616 F.2d 384, 388 (9th Cir. 1979), cert. denied,_____U.S._____, 101 S.Ct. 101,_____L.Ed.2d 760 (1978); United States v. Kirk, supra, 584 F.2d at 784; United States v. Davis, 564 F.2d 840, 845-46 (9th Cir. 1977), cert. denied, 434 U.S. 1015, 98 S.Ct. 733, 54 L.Ed.2d 760 (1978); United States v. Kershman, 555 F.2d 198, 201 (8th Cir.), cert. denied, 434 U.S. 892, 98 S.Ct. 268, 54 L.Ed.2d 178 (1977); United States v. Rosenberg, supra, 515 F.2d at 197.

The court's instruction on reasonable doubt and the presumption of innocence was also proper. See United States v. Clayton, 643 F.2d 1071, 1075 (5th Cir. 1981). There was no error in the charge that the jury "must consider only the evidence . . . admitted in the case" in deciding whether there was a reasonable doubt. As we have noted above, the court repeatedly stressed that the government bore the burden of proving each element of the offense beyond a reasonable doubt. In view of this, there was no additional requirement that the court charge that a reasonable doubt may also arise from a lack of evidence. See United States v. Tant, 412, F.2d 840, 840-41 (5th Cir.) (per curiam), cert. denied, 396 U.S. 876, 90 S.Ct. 152,_____L.Ed.2d_____(1969); Laughlin v. United States, 385 F.2d 287,

294-295 (D.C. Cir. 1967), cert. denied, 390 U.S. 1003, 88 S.Ct. 1245,_____ L.Ed.2d_____(1968); United States v. Caruso, 358 F.2d 184, 186-87 (2d Cir.), cert. denied, 385 U.S. 862, 87 S.Ct. 116,_____L.Ed.2d_____(1966).

Finally, there was no need for the court to charge the jury expressly that the presumption of innocence, standing alone, was sufficient to require an acquittal unless it was overcome by proof beyond a reasonable doubt. The court did instruct the jury that Dr. Albert was presumed innocent, that he was under no obligation to offer evidence or prove his innocence, and that the prosecution bore the burden of proving each element beyond a reasonable doubt. Read as a whole, the court's instructions clearly conveyed to the jury its obligation to acquit Dr. Albert

unless his guilt was established beyond a reasonable doubt.

For these reasons, the judgment is AFFIRMED.